UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUNE THEPSOMBANDITH, Petitioner, v. V.M. ALMAGER, Respondent.	Civil No. 07cv2248 BEN (RBB) **REPORT AND RECOMMENDATION DENYING PETITION FOR WRIT OF HABEAS CORPUS [DOC. NO. 1]**

Petitioner June Thepsombandith, a state prisoner proceeding pro se and in forma pauperis, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on November 27, 2007 [doc. no. 1], stating three claims: (1) prosecutorial misconduct, (2) ineffective assistance of trial counsel for failing to object to the prosecutor's argument, and (3) a due process violation at sentencing. (Pet. 6-7.)

Respondent V.M. Almager filed an Answer on September 30, 2008 [doc. no. 13], asserting (1) the state courts reasonably rejected Petitioner's claims that the prosecutor committed misconduct and his counsel was ineffective for failing to object; (2) this Court should reject Petitioner's challenge to his upper term sentence;

and (3) Petitioner is not entitled to an evidentiary hearing. (Answer Attach. #1 Mem. P. & A. 6, 9, 16.) Petitioner filed a Traverse on October 28, 2008 [doc. no. 17], which included a request for an evidentiary hearing. The Court has reviewed the Petition, Respondent's Answer, Petitioner's Traverse, and the lodgments. For the reasons discussed below, the Court recommends that Thepsombandith's Petition be **DENIED**.

I. FACTUAL BACKGROUND

June Thepsombandith began dating Kathy Sayrath in December of 2004. (Lodgment No. 5, Rep.'s Tr., vol. 3, 64, Oct. 11, 2005.) He lived in a one-room "shack" located in the backyard of his parents' house. (Id. at 64-65.) On Friday, March 18, 2005, Thepsombandith and Sayrath were alone inside the shack; Sayrath was on the telephone with a friend and stated that she wanted to end her relationship with Thepsombandith. (Id. at 66-67.)

Thepsombandith overheard this conversation and became very upset. (Id. at 67.) He told Sayrath to hang up the telephone, which she did. (Id.) Thepsombandith picked up a golf club and repeatedly struck Sayrath in the legs, thigh, arm, and back while she was sitting on the couch. (Id. at 68-71.) When Sayrath put her arm up to defend herself from the blows, he struck her right arm with the club and broke it between her wrist and elbow. (Id. at 70; Lodgment No. 6, Rep.'s Tr., vol. 4, 304, Oct. 12, 2005.)

Thepsombandith stomped on Sayrath and kicked her; the beating continued until Sayrath lied and told Thepsombandith she was pregnant with his child. (Lodgment No. 5, Rep.'s Tr., vol. 3, 71-72.) Sayrath was subsequently treated at the hospital emergency

room for her fractured right forearm. (Id. at 70; Lodgment No. 6, Rep.'s Tr., vol. 4, 304.)

On Monday, March 21, 2005, Sayrath went back to Thepsombandith's shack to recover her clothes. (Lodgment No. 5, Rep.'s Tr., vol. 3, 81.) Sayrath's two cousins, Sherry Gonzales and Jeniffer Souphy, accompanied her. (Id. at 81, 182.) The cousins waited outside in the backyard while Sayrath entered the shack. (Id. at 84-85, 187-88.) Thepsombandith was alone inside the shack when Sayrath entered. (Id. at 85.) He told Sayrath to sit down so they could talk and Sayrath complied. (Id. at 85-86.)

During their brief conversation, Thepsombandith had a handgun next to him that was hidden underneath a towel. (Id. at 86-87) He moved the towel to expose the handgun to Sayrath. (Id. at 86-88.) Thepsombandith grabbed the gun, stood up, and yelled at Sayrath that he was not afraid to shoot her and that he would shoot himself as well. (Id. at 88-89.) He held the barrel of the gun to Sayrath's temple while he threatened her. (Id. at 89-90.) Thepsombandith then pointed the gun in the air and fired one shot; Sayrath screamed, and Gonzales and Souphy -- who heard the commotion -- came running to the door of the shack to see what had happened. (Id. at 90, 189, 210.)

Gonzales opened the door while both she and Souphy looked inside the shack. (Id. at 210; Lodgment No. 6, Rep.'s Tr., vol. 4, 350.) Gonzales observed Sayrath in a fetal position on the couch saying, "No," while Thepsombandith pointed the gun at Sayrath. (Lodgment No. 6, Rep.'s Tr., vol. 4, 350.)

Petitioner then turned the gun and pointed it at Gonzales and said, "Are you going to be a fucking hero?" (Lodgment No. 5,

Rep.'s Tr., vol. 3, 90-91.) While Thepsombandith pointed the gun at her, Gonzales saw him cock back and release the slide of the gun. (Lodgment No. 6, Rep.'s Tr., vol. 4, 351-52, 428-29.) As Souphy began to back out of the doorway, Petitioner's father, mother, and grandfather appeared. (Id. at 353; Lodgment No. 5, Rep.'s Tr., vol. 3, 192.) Gonzales came out of the shack as well. (Lodgment No. 5, Rep.'s Tr., vol. 3, 194.) When Thepsombandith's grandfather entered the shack, Sayrath left and the three women ran to their car. (Id. at 91, 195.)

While leaving the scene in their car, the women were stopped by a police officer for failing to have a rear license plate. (Lodgment No. 5, Rep.'s Tr., vol. 3, 93; Lodgment No. 6, Rep.'s Tr., vol. 4, 357, 425.) The women informed the police officer about what had just occurred at Thepsombandith's shack. (Lodgment No. 5, Rep.'s Tr., vol. 3, 93-94; Lodgment No. 6, Rep.'s Tr., vol. 4, 427-29.) Police searched the shack later that day and discovered a shell casing on top of a speaker and a bullet hole in the ceiling. (Lodgment No. 5, Rep.'s Tr., vol. 3, 272-75.) Thepsombandith was not present during the search. (Id. at 258; Lodgment No. 6, Rep.'s Tr., vol. 4, 431.)

Later that day, Thepsombandith called Gonzales and told her he thought she was his friend; he asked her, "Why did you call the cops?" (Lodgment No. 6, Rep.'s Tr., vol. 4, 357, 431.) Thepsombandith asked Gonzales to pick him up from a nearby location. (Id. at 358, 431.) Instead, Gonzales passed this information along to the police. (Id. at 431) Police officers went to the address given by Gonzales and found Thepsombandith hiding in a closet. (Lodgment No. 5, Rep.'s Tr., vol. 3, 258;

Lodgment No. 6, Rep.'s Tr., vol. 4, 432.) Officers arrested Thepsombandith. (Lodgment No. 5, Rep.'s Tr., vol. 3, 262.)

II. PROCEDURAL BACKGROUND

The San Diego County District Attorney filed an information on April 15, 2005, charging Petitioner with assault with a firearm against Kathy Sayrath (count one) and Sherry Ann Gonzales (count two) on March 21, 2005. See Cal. Penal Code § 245(b) (West Supp. 2009); (Lodgment No. 1, Clerk's Tr., vol. 1, 5-6.) The information also accused Petitioner of discharging a firearm in a grossly negligent manner, being a felon in possession of a firearm, being a felon in possession of ammunition, and committing assault with a deadly weapon by means of force likely to cause great bodily injury. See Cal. Penal Code §§ 245(a)(1), 246.3 (West Supp. 2009), 12021(a)(1), 12316(b)(1) (West 2000); (Lodgment No. 1, Clerk's Tr., vol. 1, 5-6.) The information made additional allegations: (1) As to counts one and two, Petitioner used a firearm within the meaning of Cal. Penal Code § 12022.5(a); (2) as to count six, Petitioner personally used a deadly weapon——a golf club——within the meaning of Cal. Penal Code § 1192.7(c)(23); and (3) as to count six, Petitioner inflicted great bodily injury within the meaning of Cal. Penal Code § 12022.7(a). (Lodgment No. 1, Clerk's Tr., vol. 1, 5-6.)

On October 13, 2005, a jury convicted Petitioner of all charges and found all allegations true. (Lodgment No. 2, Clerk's Tr., vol. 2, 307-313.) He admitted having two prison priors within the meaning of §§ 667.5(b) and 668. See Cal. Penal Code §§ 667.5(b), 668 (West Supp. 2009); (Lodgment No. 2, Clerk's Tr. Vol.

2, 307, 314.) The judge sentenced Petitioner to a prison term of twenty-four years. (Lodgment No. 2, Clerk's Tr. vol. 2, 319.)

Petitioner filed his opening brief in the California Court of Appeal on June 5, 2006, and supplemented it eight weeks later. (Lodgment No. 8, Appellant's Opening Br., People v. Thepsombandith, No. D047885 (Cal. Ct. App. Dec. 12, 2006); Lodgment No. 9, Appellant's Supplemental Opening Br., People v. Thepsombandith, No. D047885 (Cal. Ct. App. Dec. 12, 2006).) He asserted in his opening brief that the "prosecutor committed misconduct in argument by misstating the law of assault, and trial counsel was ineffective for failing to object . . . ." (Lodgment No. 8, Appellant's Opening Br. 5, People v. Thepsombandith, No. D047885.) Petitioner also asserted he "was denied due process of law by imposition of an increased term of imprisonment in violation of Blakely v. Washington [542 U.S. 296 (2004)]; imposition of the prison prior enhancements was an impermissible dual use of facts." (Lodgment No. 9, Appellant's Supplemental Opening Br. 1, People v. Thepsombandith, No. D047885.)

The California Court of Appeal affirmed the judgment in an unpublished opinion filed December 12, 2006. (Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 1 (Cal. Ct. App. Dec. 12, 2006).) Thepsombandith filed a petition for review in the California Supreme Court on January 16, 2007. (Lodgment No. 14, Pet. for Review, People v. Thepsombandith, No. SD2006700554 (Cal. Jan. 16, 2007).) On February 21, 2007, the supreme court granted review of Thepsombandith's petition, but it eventually dismissed the case on September 12, 2007. (Lodgment No. 15, People v. Thepsombandith, No. S149522, order 1 (Cal. Feb.

21, 2007); Lodgment No. 16, People v. Thepsombandith, No. S149522, order 2 (Cal. Sept. 12, 2007) (en banc).)

III. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C.A. § 2244 (West 2008), applies to all federal habeas petitions filed after April 24, 1996. Woodford v. Garceau, 538 U.S. 202, 204 (2003) (citing Lindh v. Murphy, 521 U.S. 320, 326 (1997)). AEDPA sets forth the scope of review for federal habeas corpus claims:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C.A. § 2254(a) (West 2008); see also Reed v. Farley, 512 U.S. 339, 347 (1994); Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991). Because Thepsombandith's Petition was filed on November 27, 2007, AEDPA applies to this case. See Woodford, 538 U.S. at 204.

In 1996, Congress "worked substantial changes to the law of habeas corpus." Moore v. Calderon, 108 F.3d 261, 263 (9th Cir. 1997). Amended § 2254(d) now reads:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d) (West 2008).

To present a cognizable federal habeas corpus claim, a state prisoner must allege that his conviction was obtained "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A petitioner must allege that the state court violated his federal constitutional rights. Hernandez, 930 F.2d at 719; Jackson v. Ylst, 921 F.2d 882, 885 (9th Cir. 1990); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988).

A federal district court does "not sit as a 'super' state supreme court" with general supervisory authority over the proper application of state law. Smith v. McCotter, 786 F.2d 697, 700 (5th Cir. 1986); see also Lewis v. Jeffers, 497 U.S. 764, 780 (1990) (holding that federal habeas courts must respect a state court's application of state law); Jackson, 921 F.2d at 885 (explaining that federal courts have no authority to review a state's application of its law). Federal courts may grant habeas relief only to correct errors of federal constitutional magnitude. Oxborrow v. Eikenberry, 877 F.2d 1395, 1400 (9th Cir. 1989) (stating that federal courts are not concerned with errors of state law unless they rise to level of a constitutional violation).

The Supreme Court, in Lockyer v. Andrade, 538 U.S. 63 (2003), stated that "AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that

matters under § 2254(d)(1) -- whether a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law." (Id. at 71) (citation omitted). In other words, a federal court is not required to review the state court decision de novo. (Id.) Rather, a federal court can proceed directly to the reasonableness analysis under § 2254(d)(1). (Id.)

The "novelty" in § 2254(d)(1) is "the reference to 'Federal law, as determined by the Supreme Court of the United States.'" Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997). Section 2254(d)(1) "explicitly identifies only the Supreme Court as the font of 'clearly established' rules." (Id.) "[A] state court decision may not be overturned on habeas corpus review, for example, because of a conflict with Ninth Circuit-based law." Moore, 108 F.3d at 264. "[A] writ may issue only when the state court decision is 'contrary to, or involved an unreasonable application of,' an authoritative decision of the Supreme Court." (Id.) (citing Childress v. Johnson, 103 F.3d 1221, 1225 (5th Cir. 1997); Devin v. DeTella, 101 F.3d 1206, 1208 (7th Cir. 1996); Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996).)

Furthermore, with respect to the factual findings of the trial court, AEDPA provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C.A. § 2254(e)(1).

IV. DISCUSSION

A. Prosecutorial Misconduct - Claim One

During Thepsombandith's trial, defense counsel misstated the law of assault in his closing argument when he explained that Sayrath did not know the gun was loaded until after Thepsombandith fired it:

> The knowledge of the deadly capability, such as it were of this firearm, was only known after the discharge.
>
> It never again was pointed at [Sayrath]. She never stated that the firearm was pointed at her again.
>
> I dare say that if that firearm had been pointed at her a second time, we'd have an assault on Kathy by means of a firearm.

(Lodgment No. 7, Rep.'s Tr., vol. 5, 522-23, Oct. 13, 2005.)

In the prosecutor's closing argument, he corrected the defense attorney's misstatements and argued as follows:

> It doesn't matter if Kathy [Sayrath] thought the gun was loaded or not. It played no role and needs not be shown.
>
> Who cares if she knew it was loaded or not?
>
> The fact is, [Thepsombandith] knew what was going on. He knew it was a gun; he knew there were bullets in there; he was the one pulling the trigger. Okay?
>
> Don't be confused; don't be lead astray. Follow what the law tells you. All right?
>
> It doesn't matter whether Kathy knew that gun was loaded.
>
> Right after that, the defense concedes if Kathy did know the gun was loaded, and he did what he did, it would have been an assault. Okay?
>
> That's a concession that he's guilty of count one and because the law will tell you that Kathy did not need to have knowledge.

(Id. at 536-37.) The prosecutor continued, "It doesn't matter whether the gun was loaded or not, you can still assault somebody with it. Okay?

Also, there's no requirement that the gun be loaded for an assault to be carried out. That's not an element of the assault with a firearm." (Id. at 537.)

Thepsombandith alleges that (1) the prosecutor committed misconduct in closing argument by misstating the law of assault; (2) he was afforded ineffective assistance of counsel because his counsel failed to object to the prosecutor's statement; and (3) the error was prejudicial as to the charge of assault against Gonzales. (Pet. 6.) Respondent Almager contends that (1) Petitioner's prosecutorial misconduct claim is procedurally barred by his failure to contemporaneously object at trial; (2) the court of appeal reasonably applied Supreme Court precedent when it determined there was no prosecutorial misconduct; and (3) the court of appeal reasonably rejected Petitioner's claim that his counsel was ineffective. (Answer Attach. #1 Mem. P. & A. 6-9.)

1. Procedural Default

"Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." Coleman v. Thompson, 501 U.S. 722, 731-32 (1991). A habeas petitioner who has defaulted federal claims in state court by not complying with rules to raise them meets the technical requirements for exhaustion, because there are no longer any state remedies available. (Id. at 732)

(citing 28 U.S.C. § 2254(b)); Engle v. Issac, 456 U.S. 107, 125-26, n.28 (1982)). But his claim is barred for a distinct reason.

A federal court "'will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" Calderon v. U.S. Dist. Ct. (Bean), 96 F.3d 1126, 1129 (9th Cir. 1996) (quoting Coleman, 501 U.S. at 729). "In order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994) (citing Ford v. Georgia, 498 U.S. 411, 424 (1991)).

The respondent has the burden of pleading an adequate and independent procedural bar as an affirmative defense in a habeas case. See Bennett v. Mueller, 322 F.3d 573, 585 (9th Cir. 2003). The burden of proof shifts to the petitioner to place that defense in issue; the burden then shifts back to the respondent to prove the bar is applicable. See id. at 586.

Here, Respondent asserts procedural default as an affirmative defense. He contends Petitioner waived the prosecutorial misconduct claim when he failed to object at trial. (Answer Attach. #1 Mem. P. & A. 6.) Respondent relies on the California Court of Appeal's holding that Petitioner waived his claim of error on appeal when he failed to object to the alleged misconduct. (Id. at 7; Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 7.)

A federal habeas court looks to the last reasoned state court opinion to determine whether a petitioner's claim is procedurally barred. Vansickel v. White, 166 F.3d 953, 957 (9th Cir. 1999) (citing Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)). The California Supreme Court was presented with Thepsombandith's prosecutorial misconduct claim. (See Lodgment No. 14, Petition for Review 3, People v. Thepsombandith, No. S149522.) But because the denial of the petition for review was based on People v. Black (Black II), 41 Cal. 4th 799, 161 P.3d 1130, 62 Cal. Rptr. 3d 569 (2007), which does not address prosecutorial misconduct, the federal habeas court must "look through" to the last reasoned decision of the California Court of Appeal. See Ylst, 501 U.S. at 803; (Lodgment No. 16, Opinion Dismissing Review 2, People v. Thepsombandith, No. S149522).

The court of appeal invoked the state procedural bar rule requiring claims of prosecutorial misconduct to be raised at trial to preserve them for appeal. (Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 6). The Court presumes "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst, 501 U.S. at 803. Thepsombandith's prosecutorial misconduct claim is procedurally defaulted if the contemporaneous objection rule is both adequate and independent.

a. Adequacy

A state procedural rule is adequate when the rule is "firmly established and regularly followed" at the time of the alleged default. Anderson v. Calderon, 232 F.3d 1053, 1077 (9th Cir.

2000) (citations and quotations omitted) overruled on other grounds by Bittaker v. Woodford, 331 F.3d 715, 728 (9th Cir. 2003); see also Bennett v. Mueller, 322 F.3d 573, 583 (9th Cir. 2003) (citing Poland v. Stewart, 169 F.3d 573, 577 (9th Cir. 1999)); Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994) (citations omitted) (stating that rule must be clear and consistently applied at the time of petitioner's default).

The Ninth Circuit has found the contemporaneous objection rule to be an adequate procedural bar. See Rich v. Calderon, 187 F.3d 1064, 1070 (9th Cir. 1999). In California, the rule requiring timely objection at trial on specific constitutional grounds is clear, settled, and consistently applied. See Vansickel, 166 F.3d at 957 (stating "where a defendant fails to timely object, his conviction will not be reversed unless he demonstrates prejudice[]").

b. Independence

A state procedural rule is independent when the "state law basis for the decision [is] not . . . interwoven with federal law." La Crosse v. Kernan, 244 F.3d 702, 704 (9th Cir. 2001) (citing Michigan v. Long, 463 U.S. 1032, 1040-41 (1983); see Harris v. Reed, 489 U.S. 255, 265 (1989)). A state law basis is interwoven with federal law when "'the state has made application of the procedural bar depend on an antecedent ruling on federal law [such as] the determination of whether federal constitutional error has been committed.'" Park v. California, 202 F.3d 1146, 1152 (9th Cir. 2000) (quoting Ake v. Oklahoma, 470 U.S. 68, 75 (1985)).

The Ninth Circuit has found that the California contemporaneous objection rule is independent of federal law. See Vansickel, 166 F.3d at 957 (holding that "by failing to object, [defendant] procedurally defaulted on the federal constitutional claim [defendant] raises in this habeas proceeding[]"). Thepsombandith's trial counsel failed to object on any ground when the prosecutor stated that the gun need not be loaded for Thepsombandith to be convicted of assault with a firearm. (Lodgment No. 7, Rep.'s Tr., vol. 5, 537.) The court of appeal reiterated that a claim of prosecutorial misconduct is waived when a defendant does not raise it in the trial court. (Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 6.)

Although the California Court of Appeal also addressed the merits of Petitioner's prosecutorial misconduct claim, that does not prevent the application of an adequate and independent state bar. Harris v. Reed, 489 U.S. at 264 n.10; (Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 7-9.) A state court may reach the merits of a federal claim in an alternative holding so long it explicitly invokes a state procedural bar rule as a separate basis for its decision. Harris, 489 U.S. at 264 n.10.

Petitioner is procedurally barred from raising his claim that the prosecutor committed misconduct because the contemporaneous objection rule is an adequate and independent state doctrine.

c. Cause and Prejudice

Review of Petitioner's prosecutorial misconduct claim is precluded unless he "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal

law, or demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. at 749-50 (citing Murray v. Carrier, 477 U.S. 478, 485 (1986)); see also High v. Ignacio, 408 F.3d 585, 590 (9th Cir. 2005) (citing Coleman, 501 U.S. at 750; Franklin v. Johnson, 290 F.3d 1223, 1230-31 (9th Cir. 2002)). Likewise, a habeas petitioner who has failed to comply with a state's contemporaneous objection rule at trial must show cause and prejudice to obtain habeas relief under federal law. Murray, 477 U.S. at 485 (citing Wainwright v. Sykes, 433 U.S. 72, 87 (1977)).

Petitioner contends that his claim is not waived because he can establish cause and prejudice for any default. (Traverse 4, 8.) Thepsombandith argues that ineffective assistance of trial counsel caused the default. (Id. at 4.) Specifically, he asserts that counsel's failure to contemporaneously object to the prosecutor's improper argument establishes cause for the default. (Id.)

A petitioner establishes cause when he or she shows some objective factor, external to the defense, that impeded counsel's efforts to comply with the procedural rule. Murray, 477 U.S. at 488; see also McCleskey v. Zant, 499 U.S. 467, 493 (1991) (discussing cause under abuse of writ doctrine). Constitutionally ineffective assistance of counsel is an objective factor that establishes cause. McCleskey, 499 U.S. at 493-94. "Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default." Id. at 494.

To establish ineffective assistance, the inquiry is whether counsel's performance fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). First, the petitioner must show that the attorney's performance was deficient. Id. at 687. Second, "the [petitioner] must show that the deficient performance prejudiced the defense." (Id.) In other words, "[t]here is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. For Petitioner to prevail on his ineffective assistance of counsel claim, he must satisfy both prongs of the Strickland test. Id. at 687.

The Court's review of counsel's performance is highly deferential, and there is a strong presumption counsel rendered adequate assistance and exercised reasonable professional judgment. United States v. Ferreira-Alameda, 815 F.2d 1251, 1253 (9th Cir. 1987) (citations omitted); Butcher v. Marquez, 758 F.2d 373, 376 (9th Cir. 1985) (citing Strickland, 466 U.S. at 690). Petitioner does not overcome the presumption of competency. See Strickland, 466 U.S. at 689; Morris v. California, 966 F.2d 448, 456 (9th Cir. 1991), cert. denied, 506 U.S. 831 (1992).

The state court of appeal concluded that the prosecutor was talking about count one, not count two, when he said, "Also, there's no requirement that the gun be loaded for an assault to be carried out." (Lodgment No. 7, Rep.'s Tr., vol. 5, 537; Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 8.) The record indicates that the prosecutor was clarifying the law

regarding the assault of Sayrath alleged in count one, and he continued discussing the assault on her. (Lodgment No. 7, Rep.'s Tr., vol. 5, 537.) The federal court "need not determine the actual explanation for trial counsel's failure to object, so long as his failure to do so falls within the range of reasonable representation." Morris, 966 F.2d at 456-57 (citation omitted).

Trial counsel's failure to object did not fall below an objective standard of reasonableness. See id. at 456 (stating that an effective advocate could have reasonably decided not to object). The prosecutor made several references to "Kathy," the victim in count one, directly before and after the complained of statement. (Lodgment No. 7, Rep.'s Tr., vol. 5, 536.) The court of appeal found that the record was clear that the prosecutor's argument was directed to the assault alleged in count one. (Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 8.) This conclusion is a reasonable determination of the facts.

The state appellate court also found that even if the jury construed the prosecutor's argument as applying to count two, as Petitioner asserts, the result was not prejudicial. The fundamental miscarriage of justice exception to a procedural default is applied in extraordinary cases when a constitutional violation results in the conviction of an innocent person. Schlup v. Delo, 513 U.S. 298, 327 (1995) (citing Murray v. Carrier, 477 U.S. at 496). Thepsombandith "cannot establish prejudice because there is no reasonable probability that but for counsel's error, the result of the trial would have been different." Vansickel,

166 F.3d at 958 (citing White v. Lewis, 874 F.2d 599, 604 (9th Cir. 1989)); see Strickland, 466 U.S. at 694.

In his Traverse, Petitioner acknowledges that "the prosecutor's statement was specifically directed at count one . . . ." (Traverse 5.) Nonetheless, Petitioner asserts "the argument could erroneously be applied to count two." (Id. at 9.) It is not reasonably probable that the jury convicted Thepsombandith of count two, assaulting Gonzalez with a firearm, if the jurors believed the gun was not loaded.

Additionally, the evidence indicates that the gun was loaded when he pointed it at Gonzales. Merely seconds after Gonzales heard what she thought was a gunshot, she ran into the shack and saw Petitioner pointing a black object she thought was a gun at Sayrath; he then pointed it at her. (Lodgment No. 6, Rep.'s Tr., vol. 4, 350-52.) Gonzales testified that she heard Thepsombandith cock the gun; it sounded "[l]ike putting the bullet in the chamber." (Id. at 351.) Thepsombandith said, "Are you going to be a fucking hero?" (Lodgment No. 5, Rep.'s Tr., vol. 3, 90-91.) The evidence was sufficient for the jury to believe the gun was loaded and find Petitioner committed an assault upon Sherry Gonzalez.

Petitioner cannot establish his counsel's deficient performance rendered the result of the trial unreliable. See Fretwell v. Lockhart, 506 U.S. 364, 372 (1993) (citing Strickland, 466 U.S. at 687). Nor can he demonstrate a reasonable probability that he would have prevailed if his attorney had timely objected to the prosecution's statement. See Strickland, 466 U.S. at 687. Therefore, Thepsombandith cannot establish cause and prejudice to

excuse the procedural default of his prosecutorial misconduct claim by asserting ineffective assistance of counsel.

2. Whether Misconduct Occurred

Even if Petitioner's prosecutorial misconduct claim is not procedurally barred, there was no misconduct. Petitioner asserts the prosecutor committed misconduct infecting count two by telling the jury the gun did not have to be loaded to commit assault.[1] (Traverse 5.) He claims the statement, although directed at count one, was general enough for the jury to believe it applied to both counts of assault. (Id.) Respondent argues, and the court of appeal concluded, that the statement was legally correct as to count one, and the argument was harmless as to count two. (Answer Attach. #1 Mem. P. & A. 8; Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 8-9.)

Petitioner must satisfy a two-part test to obtain federal habeas relief. First, he must show the prosecutor's comment was improper. Tak Sun Tan v. Runnels, 413 F.3d 1101, 1112 (9th Cir. 2005); see Darden v. Wainwright, 477 U.S. 168, 180-81 (1986). Second, he must show the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden, 477 U.S. at 181 (quoting Donnelly v.

---

[1] Thepsombandith maintains the prosecutor's theory on count one was based on Thepsombandith pressing the gun barrel to Sayrath's head. (Lodgment No. 7, Rep.'s Tr., vol. 5, 498-99; Traverse 5.) Whereas, he argues count two was based on the Petitioner pointing the gun at Gonzalez. (Lodgment No. 7, Rep.'s Tr., vol. 5, 499; Traverse 5.) "The latter theory did require proof Petitioner had the 'present ability' to apply force to Gonzalez, i.e., that the gun was loaded. (Traverse 5) (citing People v. Rodriguez, 20 Cal. 4th 1, 10 n.3, 971 P.2d 618, 623 n.3, 82 Cal. Rptr. 2d 413, 418 n.3 (1999); People v. Fain, 34 Cal. 3d 350, 357 n.6, 667 P.2d 694, 698 n.6, 193 Cal. Rptr. 890, 894 n.6 (1983).

DeChristoforo, 416 U.S. 637 (1974)); accord Greer v. Miller, 483 U.S. 756, 765 (1987); Thompson v. Borg, 74 F.3d 1571, 1576 (9th Cir. 1996); Tak Sun Tan, 413 F.3d at 1112).

a. Improper Comments

Habeas corpus relief may be granted if the adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ." 28 U.S.C. § 2254(d)(1). "The prosecutor's comments must be evaluated in light of the defense argument that preceded it . . . ." Darden, 477 U.S. at 182.

In his closing argument, defense counsel misstated the law on assault when he emphasized that Sayrath did not know the gun was loaded until after Thepsombandith fired it. (Lodgment No. 7, Rep.'s Tr., vol. 5, 522; see Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 5.) In response, the prosecutor correctly explained that Sayrath's knowledge was not an element of assault stating, "[Knowledge] played no role and need[] not be shown." (Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 6.) The prosecutor's following statement -- that the gun does not have to be loaded to commit assault -- was not improper as applied to count one. (Id. at 8.)

"Counsel are given latitude in the presentation of their closing arguments . . . ." Ceja v. Stewart, 97 F.3d 1246, 1253-54 (9th Cir. 1996) (quoting United States v. Baker, 10 F.3d 1374, 1415 (9th Cir. 1993), cert. denied, 513 U.S. 934 (1994)). "It is helpful as an initial matter to place these remarks in context." Darden, 477 U.S. at 179. In Darden, the prosecutors made several

improper statements in closing argument. For instance, the prosecution recommended the death penalty for the defendant, stating, "'That's the only way I know that he is not going to get out on the public.'" Id. at 180 n.10. Then, the prosecutor stated, "'As far as I am concerned, . . . [Defendant is] an animal . . . .'" Id. at n.11. "'I wish [the decedent] had had a shotgun in his hand . . . and blown [Defendant's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun.'" Id. at n.12. The Court held that the comments "undoubtedly were improper." Id. at 180. Ultimately, however, the Court determined the defendant was not deprived of a fair trial. Id. at 181.

The prosecutor's argument must be viewed in context. The comment came at the end of the trial. (See Lodgment No. 7, Rep.'s Tr., vol. 5, 488-89.) The statement was made in response to defense counsel's closing argument, which misstated the law of assault by emphasizing that the victim must have known the gun was loaded before Thepsombandith fired it. (Id. at 522.) Like the argument in Darden, the prosecutor's argument here "was invited by or was responsive to the opening summation of the defense." Darden, 477 U.S. at 182. "The idea of 'invited response' is used not to excuse improper comments, but to determine their effect on the trial as a whole." Id. "[T]he challenged statement was one comment by the prosecutor in his closing argument that consisted of 36 pages of transcript." (Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 9.)

The prosecution's isolated statement that "there's no requirement that the gun be loaded for an assault to be carried

out[]" against Sayrath, is distinguished from the improper statements made in Darden. (Lodgment No. 7, Rep.'s Tr., vol. 5, 537); see Darden, 477 U.S. at 180. The appellate court's decision that the prosecutor's statements were not improper is neither contrary to, nor an unreasonable application of, clearly established law.

Habeas corpus may also be granted if the adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Although the court of appeal held Petitioner waived the prosecutorial misconduct claim, it nonetheless considered the claim on the merits and determined reversal was not required. (Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 7.)

The factual basis for the court of appeal's conclusion is as follows:

> In closing argument defense counsel raised the fact that Sayrath was not aware the gun was loaded until after Thepsombandith fired it, misstating the law on assault: "The knowledge of the deadly capacity, such as it were of this firearm, was only known after the discharge. [¶] It never again was pointed at her. She never stated that the firearm was pointed at her again. [¶] I dare say that if the firearm had been pointed at her a second time, we'd have an assault on [Sayrath] by means of a firearm."
>
> On rebuttal, in response to this argument by defense counsel, the prosecutor stated, "Now, here's one you've got to be real careful with. [Sayrath] didn't know the gun was loaded, so it can't be assault. Did you hear that?" The prosecutor went on to explain, correctly, that Sayrath's knowledge was not an element of the charge of assault: "The person committing the act -- that's him -- the person committing the act was aware of facts that would lead a reasonable person to realize that a direct, natural, and probable result of this act, that physical force would be applied to another person. [¶] It doesn't matter if [Sayrath]

> thought the gun was loaded or not. It played no role and needs not be shown. [¶] . . . [¶] The fact is, he knew what was going on. He knew it was a gun; he knew there were bullets in there; he was the one pulling the trigger."
>
> In further discussing count 1 assault against Sayrath, however, the prosecutor then made the following statements: "*It doesn't matter whether the gun was loaded or not,* you can still assault somebody with it. Okay? [¶] Also, *there's no requirement that the gun be loaded for an assault to be carried out. That's not an element of the assault with a firearm.*" (Italics added.)

(Id. at 5-6.)

Defense counsel misstated the law of assault in closing argument: "[Sayrath] testified she didn't even know [the gun] was loaded at the point in time that it was up against her head." (Lodgment No. 7, Rep.'s Tr., vol. 5, 522.) The prosecutor subsequently clarified to the jury that knowledge is not an element of assault. He made these statements in response to the preceding defense argument. (Id. at 535-36); see Darden, 477 U.S. at 179.

Moreover, the prosecutor referenced Sayrath ("Kathy")——the victim in count one——directly before and after stating that "there's no requirement that the gun be loaded." (Lodgment No. 7, Rep.'s Tr., vol. 5, 536.) It is unlikely that the jury applied the statement to Gonzales (the victim in count two). The argument immediately preceding and following the statement at issue are in the context of discussing "Kathy Sayrath." (Id. at 536-37.) The prosecutor did not mention "Sherry Gonzales" until later by stating, "When Sherry came in, she described how [Sayrath] looked." (Id. at 537.)

In the context of the trial, the state court reasonably determined the facts in the record when it held that the

prosecution's statement was limited to count one, which was a correct statement of law. (Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 8-9; see also 28 U.S.C. § 2254(d)(2).)

b. Harmless Error

When considering a claim of prosecutorial misconduct, the court must also determine whether the error requires reversal or was harmless. Thompson v. Borg, 74 F.3d 1571, 1577 (9th Cir. 1996); United States v. Kallin, 50 F.3d 689, 693 (9th Cir. 1995) (citing Brecht v. Abrahamson, 507 U.S. 619, 629 (1993)); see also Greer v. Miller, 483 U.S. 756, 765 (1987) (prosecutorial misconduct is subject to harmless error review).

The issue is whether the prosecutor's comments rendered Thepsombandith's trial so unfair that his conviction was a denial of due process. Darden, 477 U.S. at 181 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).) The misconduct is reviewed in the context of the entire trial. See, e.g., Greer, 483 U.S. at 766 (holding that a single question, an immediate objection, and two curative instructions "clearly" demonstrate the prosecutor's improper question did not violate due process); Donnelly, 416 U.S. at 639. Even if the prosecutor's statements could be considered improper, they were not prejudicial.

Petitioner asserts there is a reasonable probability the jury would have found the "present ability" element of assault had not been proved beyond a reasonable doubt without the prosecutor's misstatement. (Traverse 7.) He argues the evidence was equivocal as to whether the gun was loaded, and taking that question away from the jury infected the verdict as to count two. (Id.)

Petitioner claims the prosecutor's comment had a "substantial and injurious effect" on the verdict. (Traverse 8 (citation omitted).) But the prosecutor's statements were not "of sufficient significance to result in the denial of the defendant's right to a fair trial." Greer, 483 U.S. at 765 (quoting United States v. Bagley, 473 U.S. 667, 676 (1985)); Darden, 477 U.S. at 180-81 (holding that even though the prosecutor's statements were "undoubtedly improper," they still did not deny Petitioner of a fair trial).

Even if the prosecutor's comment that "there's no requirement that the gun be loaded" could have been construed by the jury to apply to the second count of assault, the evidence clearly suggested that the gun was loaded when Thepsombandith pointed it at Gonzales. Thepsombandith held a gun to Sayrath's head; then he fired a shot into the air, and Sayrath screamed. (Lodgment No. 5, Rep.'s Tr., vol. 3, 90, 189, 210.) Gonzales ran to the shack and opened the door to ensure Sayrath was safe. (Id.) Gonzales saw Thepsombandith holding the gun and watched as he "cocked" it. (Lodgment No. 6, Rep.'s Tr., vol. 4, 351-52, 428-29.) It is not reasonably probable that the jury convicted Thepsombandith of assaulting Gonzalez with a firearm while believing the gun was unloaded when he pointed it at her. The weight of the evidence against Thepsombandith is heavy, which "reduced the likelihood that the jury's decision was influenced by argument." Darden, 477 U.S. at 182. Thus, the prosecutor's statement did not prejudice Petitioner. Id. at 181.

Accordingly, the prosecutor's comments did not deny Thepsombandith a fair trial. The state court reasonably concluded

"[i]t was not a pattern of misconduct. . . ." (Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 9 (citation omitted).) The court of appeal correctly held there was no resulting prejudice. (Id.) The state court decision was neither contrary to, nor an unreasonable application of, clearly established United States Supreme Court law. 28 U.S.C. § 2254(d)(1). Moreover, the state court's decision was based on a reasonable determination of the facts in light of the evidence presented. See 28 U.S.C. § 2254(d)(2).

For all these reasons, ground one in Thepsombandith's Petition does not entitle him to relief.

B. Ineffective Assistance of Trial Counsel - Claim Two

As part of ground one, Thepsombandith argues that his trial counsel was ineffective for failing to object to the prosecutor's closing argument. (Pet. 6.) Respondent urges that the California Court of Appeal decision denying this argument on its merits was a reasonable application of Supreme Court precedent. (Answer Attach. #1 Mem. P. & A. 6.)

The last state court to address the merits of Petitioner's ineffective assistance of counsel claim was the California Court of Appeal. (See Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 9-11.) This Court reviews that decision. Ylst v. Nunnemaker, 501 U.S. at 806.

The state appellate court described the burden Thepsombandith must satisfy to establish that his trial counsel was ineffective. "A defendant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing

professional norms; and (2) the deficient performance resulted in prejudice." (Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 10.) Trial counsel is presumed to be competent. Strickland, 466 U.S. at 689. "To rebut this presumption, [Petitioner] must demonstrate that his counsel's performance was unreasonable under prevailing professional norms and was not the product of sound strategy." Sechrest v. Ignacio, 549 F. 3d 789, 815 (9th Cir. 2008). Counsel's representation is deficient if "it falls outside the range of competence demanded of attorneys in criminal cases." Id.

Still, the state court rejected Petitioner's ineffective assistance claim, concluding that the prosecutor's closing comment was not improper. As explained above, the California Court of Appeal held that prosecutor's statement was not misconduct. The court concluded that "[d]efense counsel could reasonably have believed that the jury would only understand the statements as applying to count 1, and, therefore, the failure to object did not fall below an objective standard of reasonableness." (Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 11.) Federal courts have held that the failure to make a meritless objection is not deficient performance and cannot constitute ineffective assistance. Jones v. Smith, 231 F.3d 1227, 1239 n.8 (9th Cir. 2000) (citing Boag v. Raines, 769 F.2d 1341, 1344 (9th Cir 1985); accord Green v. Johnson, 160 F.3d 1029, 1037 (5th Cir. 1998).

Furthermore, as discussed above, Petitioner cannot establish that he suffered any prejudice because of the prosecutor's comment. The state court concluded that "the evidence was

overwhelming that the gun was loaded when Thepsombandith pointed it at Gonzales. Therefore, it is not reasonably probable that [he] would have received a more favorable result but for counsel's failure to object to the prosecutor's statement." (Id. (citing Strickland, 466 U.S. at 693-94).) Because Petitioner cannot show that the prosecutor's argument constituted prejudicial misconduct, he cannot show that he was prejudiced by counsel's failure to object.

The state court concluded that Thepsombandith did not establish that his trial counsel's representation was below an objective standard of reasonableness or that the result of his trial would have been different if counsel had objected to the prosecutor's closing argument. (Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 9-11.) This decision was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. See 28 U.S.C. § 2254(d)(1). Nor was the decision based upon an unreasonable determination of the facts. See 28 U.S.C. § 2254(d)(2). Accordingly, he is not entitled to habeas relief on this claim.

C. Due Process Violation at Sentencing - Claim Three

Thepsombandith argues that the imposition of the ten-year upper term for the gun enhancement violated his right to due process. (Pet. 7.) Petitioner was sentenced pursuant to California's determinate sentencing law ("DSL"), which directs how judges sentence defendants for certain offenses. California's sentencing scheme proscribes three possible terms of imprisonment: a lower, middle, and upper term. See, e.g., Cal. Penal Code §

12022.5(a) (West 2000) (setting additional and consecutive imprisonment terms of three, four, or ten years).

On January 17, 2006, the trial judge sentenced Thepsombandith to twenty-four years imprisonment. (Lodgment No. 2, Clerk's Tr., vol. 2, 319.) As to the first count of assault with a firearm (Kathy Sayrath), the court imposed a six-year term and a ten-year enhancement. (Lodgment No. 2, Clerk's Tr., vol. 2, 278.) For the second count of assault with a firearm (Sherry Gonzalez), the court imposed a two-year term and a sixteen-month enhancement. (Id.) The court imposed an eight-month term for discharging a firearm in a grossly negligent manner (count three) and a one-year enhancement. (Id.) Petitioner was sentenced to one-year imprisonment for assault with serious bodily injury (count six). (Id.) The court also imposed one-year enhancements for each of Petitioner's two prison priors under Cal. Penal Code § 667.5(b). (Id.; see Cal. Penal Code § 667.5(b) (West Supp. 2009).) The court stayed the sentence on being a felon in possession of a firearm and being a felon in possession of ammunition (counts four and five). (Lodgment No. 2, Clerk's Tr., vol. 2, 278, 319.)

At the time of sentencing, the judge stated his reasons for imposing the ten-year upper term for the gun enhancement.

> As to count one, I'll be imposing the mid term of six years. [¶] On the 12022.5(A) allegation, I am going to impose the upper term of ten years.
>
> Now, I think this is significant. [¶] I have definite concerns about this defendant. [¶] This is his fourth time of having a gun in his possession. There were three other times. [¶] Everything that we did to convince him those three other times that you're not to have a gun, obviously, didn't have an impact, and he knew it. [¶] The gun is what makes this so dangerous. [¶] I do think he has a lack of control, and he is

> dangerous because of that. [¶] So, I think there is a legal basis for that.
>
> I didn't use the priors on the actual 245(B) count one core offense. [¶] So, it's not a double use. I'm using only the 12022.5 allegation. [¶] Not that that would prohibit the court from doing it, but I have chosen to approach it this way. [¶] The fourth time. You can't have the gun, period.

(Lodgment No. 7, Rep.'s Tr., vol. 5, 596-97.)

On direct appeal, Thepsombandith argued the ten-year upper term violated his right to due process under Blakely v. Washington, 542 U.S. 296 (2004). (Lodgment No. 9, Appellant's Supplemental Opening Br. 1-2, People v. Thepsombandith, No. D047785.) The court of appeal rejected his contention that the trial court impermissibly imposed the upper term on the firearm enhancement "based upon facts beyond those found by the jury." (Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 12.) The California Supreme Court had rejected a similar claim in People v. Black, 35 Cal. 4th 1238, 1244, 113 P.3d 534, 536, 29 Cal. Rptr. 3d 740, 742 (2005), vacated, 549 U.S. 1190 (2007). Initially, the California Supreme Court granted Thepsombandith's petition for review; the court later dismissed it after deciding People v. Black (Black II), 41 Cal. 4th 799, 161 P.3d 1130, 62 Cal. Rptr. 3d 569 (2007). (Lodgment No. 15, People v. Thepsombandith, No. S149522, order 1); Lodgment No. 16, People v. Thepsombandith, No. S149522, order 2.)

1. Retroactivity

Federal habeas courts may not grant relief based on a rule announced after a petitioner's conviction and sentence became final. Caspari v. Bohlen, 510 U.S. 383, 389 (1994) (citing Stringer v. Black, 503 U.S. 222, 227 (1992).) "A state prisoner

whose conviction is final may not automatically have the rule from a subsequently decided case applied in a petition for habeas corpus pursuant to § 2254." Schardt v. Payne, 414 F.3d 1025, 1033 (9th Cir. 2005) (citing Teague v. Lane, 489 U.S. at 310).

Teague lays out a three-part test for determining when a decision of the Supreme Court setting forth a new procedural rule will apply retroactively on collateral review:

> First, the court must determine when the defendant's conviction became final. Second, it must ascertain the legal landscape as it then existed and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the rule is actually "new." Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.

Beard v. Banks, 542 U.S. 406, 411 (2004) (internal citations and quotation marks omitted). The two exceptions are well known: (1) rules forbidding punishment for certain conduct or for defendants of a particular status and (2) "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Schardt, 414 F.3d at 1033-34 (quoting Beard, 542 U.S. at 416-17.

This Court must determine whether Cunningham v. California, 549 U.S. 270 (2007), applies retroactively under the Teague framework. Beard, 542 U.S. at 412 (holding that habeas courts must analyze Teague's nonretroactivity principle prior to considering the merits whenever a retroactivity issue is raised). Petitioner's case was pending on direct review when Cunningham was decided in 2007. (Lodgment No. 15, People v. Thepsombandith, No. S149522, order 1.) Accordingly, the Court must move to the second step and decide whether Cunningham announced a "new rule" under

Teague. The Supreme Court has outlined the analysis required to determine when a "new rule" has been established.

> In general, . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

Teague, 489 U.S. at 301 (citations omitted) (emphasis added).

In a series of cases, the Supreme Court has announced the contours of a defendant's right to trial by jury regarding facts affecting the sentence. See Apprendi v. New Jersey, 530 U.S. 466 (2000); Blakely v. Washington, 542 U.S. 296; United States v. Booker, 543 U.S. 220 (2005).

In Apprendi, the Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. In Blakely, the Court applied Apprendi and invalidated a sentencing scheme that allowed a judge to increase a defendant's sentence beyond the statutory maximum based on judicial factfinding. Blakely, 542 U.S. at 303. "[T]he 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. (citing Ring v. Arizona, 536 U.S. 584, 602 (2002)). The Ninth Circuit has held that both Apprendi and Blakely announced new rules of constitutional law. Schardt, 414 F.3d at 1038; Jones v. Smith, 231 F.3d 1227, 1236 (9th Cir. 2000).

In Booker, the Court invalidated Federal Sentencing Guidelines to the extent they allowed the judge to make independent factfindings that placed the defendant in a higher sentencing range. Booker, 543 U.S. at 233. "For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." Id. But in People v. Black (Black I), 35 Cal. 4th 1238, 113 P.3d 534, 29 Cal. Rptr. 3d 740, vacated, 549 U.S. 1190, the California Supreme Court held that California's DSL was not invalidated by Blakely. Id. at 1244, 113 P.3d at 536, 29 Cal. Rptr. 3d at 742.

In Cunningham, 549 U.S. 270, the Supreme Court held that DSL violated Apprendi's "bright-line rule" that facts in aggravation must be submitted to a jury and found beyond a reasonable doubt. Id. at 291 (citing Blakely, 542 U.S. at 307-08). The Court concluded that California's DSL resembled the sentencing systems invalidated in Blakely. Id. at 294.

At the time Thepsombandith was sentenced, Apprendi, Blakely, and Booker clearly established that sentencing schemes that raise the maximum term based on facts not found by a jury violate a defendant's due process rights. See Apprendi, 530 U.S. 466; Blakely, 542 U.S. 296; Booker, 543 U.S. 220.

Cunningham applied these precedents when it held that aggravating factors must be submitted to a jury and found beyond a reasonable doubt to preserve a defendant's basic jury-trial right. Cunningham, 549 U.S. at 291 (citing Blakely, 542 U.S. at 307-08). Therefore, the holdings of Apprendi, Blakely, Booker, and Cunningham collectively constitute clearly established federal

law. This law, however, is not new. The Ninth Circuit, in Butler v. Curry, 528 F.3d 624 (9th Cir. 2008), held that Cunningham applies retroactively because it did not announce a new rule of constitutional law within the meaning of Teague. Id. at 639, cert. denied, Curry v. Butler, 77 U.S.L.W. 3359 (U.S. Dec. 15, 2008) (No. 08-517); accord Wright v. Dexter, 546 F.3d 1096, 1097 (9th Cir. 2008). In Butler, the Ninth Circuit found that Apprendi, Blakely and Booker compelled the result in Cunningham. Id. at 635.

"Apprendi, Blakely, and Booker made 'courts throughout the land' aware that sentencing schemes that raise the maximum possible term based on facts not found by a jury violate the constitutional rights of defendants." Id. at 639 (citing Teague, 489 U.S. at 306). The court further held that "[n]o principles of comity or federalism would be served by refusing to apply this rule to functionally indistinguishable state sentencing schemes on collateral review. Cunningham thus did not announce a new rule of constitutional law and may be applied retroactively on collateral review." Id.

Apprendi (2000), Blakely (2004) and Booker (2005) were decided before Thepsombandith was convicted. See Apprendi, 530 U.S. 466; Blakely, 542 U.S. 296; Booker, 543 U.S. 220. Cunningham was decided on January 22, 2007, when Thepsombandith's case was pending on direct review in the California Supreme Court. (Lodgment No. 15, People v. Thepsombandith, No. S149522, order 1.) Cunningham is retroactive and applies to Petitioner's case. Butler, 528 F.3d at 639.

2. AEDPA

Next, the Court must inquire whether the state supreme court's reliance on Black II was contrary to "clearly established federal law." 28 U.S.C. § 2254(d)(1). To obtain relief under § 2254, the state court's decision must be either "contrary to" or an "unreasonable application" of clearly established Supreme Court law. Williams v. Taylor, 529 U.S. 362, 412-13 (2000). "A state court decision is contrary to clearly established federal law if the state court either applies a rule that contradicts the governing law set forth by the Supreme Court or arrives at a different result when confronted by a set of facts that are materially indistinguishable from a decision of the Supreme Court." Sims v. Rowland, 414 F.3d 1148, 1151 (9th Cir. 2005) (citing Williams, 529 U.S. at 405-06); see also Butler, 528 F.3d at 640. A state court decision is an unreasonable application of federal law when it applies Supreme Court precedent in an objectively unreasonable manner, or unreasonably fails to extend the legal principles of a Supreme Court decision to situations which it should have controlled. Sims, 414 F.3d at 1152 (citing Brown v. Payton, 544 U.S. 133, 141 (2005); Ramdass v. Angelone, 530 U.S. 156, 166 (2000)); see also Butler, 528 F.3d at 640.

The court must "look to the last reasoned decision of the state court as the basis of the state court's judgment" when reviewing a state court decision. Polk v. Sandoval, 503 F.3d 903, 909 (9th Cir. 2007) (citing Benson v. Terhune, 304 F.3d 874, 880 n.5 (9th Cir. 2002). Respondent distinguishes this case from Butler. (Answer Attach. #1 Mem. P. & A. 13.) The warden argues that in Butler, the only state court determinations on the merits

rested on the reasoning of Black I. (Id.) In contrast, Respondent argues, the California Supreme Court rejected Thepsombandith's claim in light of Black II. (Id.; Lodgment No. 16, People v. Thepsombandith, No. S149522, order 2 (Cal. Sept. 12, 2007) (en banc).)) The California Supreme Court stated: "In light of People v. Black (2007) 41 Cal.4th 799 [161 P.3d 1130; 62 Cal. Rptr. 3d 569] (Black II), review in the above-entitled matters is dismissed." (Lodgment No. 16, People v. Thepsombandith, No. S149522, order 2.)

The California Supreme Court denied Thepsombandith's petition for review with a one-sentence explanation. Consequently, this Court must determine whether that provides a sufficient basis for review or whether it should look to the California Court of Appeal's opinion. (Compare id.), with Ylst v. Nunnemaker, 501 U.S. at 803 (holding that where there has been one reasoned state judgment rejecting a federal claim, it is presumed that later unexplained orders upholding that judgment or rejecting the claim rest upon the same ground).) In Ylst, the Court explained, "The consequent question presented . . . is how federal courts in habeas proceedings are to determine whether an unexplained order (by which we mean an order whose text or accompanying opinion does not disclose the reason for the judgment) rests primarily on federal law." Id. at 802.

The state supreme court relied on the reasoning in Black II when it dismissed Thepsombandith's petition. (Lodgment No. 16, People v. Thepsombandith, No. S149522, order 2.) This Court must examine Black II to decide whether the requirements of AEDPA have been met. Butler, 528 F.3d at 640.

In Black II, the state court noted, "The United States Supreme Court consistently has stated that the right to a jury trial does not apply to the fact of a prior conviction." People v. Black (Black II), 41 Cal. 4th at 818, 161 P. 3d at 1142, 62 Cal. Rptr. 3d at 583 (citing Cunningham, 549 U.S. at 288; Blakely, 542 U.S. at 301; Apprendi, 530 U.S. at 490; Almendarez-Torres v. United States, 523 U.S. 224 (1998). The California Supreme Court correctly identified controlling federal law. It must also apply that law reasonably.

Here, the sentencing judge explained the basis for the sentence on count one.

> On the 12022.5(A) allegation [personally used a firearm], I am going to impose the upper term of ten years.
>
> Now, I think this is significant. [¶] I have definite concerns about this defendant. [¶] This is his fourth time of having a gun in his possession. There were three other times. [¶] Everything that we did to convince him those three other times that you're not to have a gun, obviously, didn't have an impact, and he knew it.
>
> . . . .
>
> I do think he has a lack of control, and he is dangerous because of that. [¶] So, I think there is a legal basis for that. [¶] I didn't use the priors on the actual 245(B) count one core offense. [¶] So, it's not a double use. I'm using only the 12022.5 allegation.

(Lodgment No. 7, People v. Thepsombandith, Rep.'s Tr., vol. 5, 596-97.)

When Thepsombandith was sentenced in 2006, California's DSL stated that when a statute specifies three possible imprisonment terms, the court shall order imposition of the middle term unless there are circumstances in aggravation or mitigation of the crime. Cal. Penal Code § 1170(b) (West Supp. 2009); Cal. R. Ct. 4.420(a-

b) (West 2009).[2] To determine whether the trial court imposed the sentence in violation of the Constitution, the Court must analyze the aggravating factors on which the judge relied.

Under California law, only one aggravating factor is necessary to authorize an upper term sentence. Butler, 528 F.3d at 642; People v. Black (Black II), 41 Cal. 4th at 815, 161 P.3d at 1140, 62 Cal. Rptr. 3d at 581 (citing Cal. Penal Code § 1170(b); People v. Osband, 13 Cal. 4th 622, 728, 919 P.2d 640, 709, 55 Cal. Rptr. 2d 26, 55 (1996).) Moreover, Cunningham explains that Thepsombandith's right to trial by jury is violated if he was sentenced to the upper term based solely on circumstances neither admitted nor submitted to the jury and proved beyond a reasonable doubt. Cunningham, 549 U.S. at 293; Apprendi, 530 U.S. at 475; see Booker, 543 U.S. at 244; see Blakely, 542 U.S. at 301; see also Butler, 528 F.3d at 648.

Thepsombandith contends his sentencing violated clearly established Supreme Court precedent because the trial judge imposed the upper term based on factors a jury did not find. (Traverse 21.) He argues that the prior conviction exception is inapplicable to his case because the trial judge did not rely solely on prior convictions. (Id. at 18.) Rather, the court also considered that Petitioner's lack of control made him dangerous, and he had not been deterred by his prior convictions. (Traverse

---

[2] Parts of section 1170 of the California Penal Code were amended in March of 2007 in response to Cunningham to read: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." Cal. Penal Code § 1170(b) (West Supp. 2009). Rule 4.420 of the California Rules of Court was also amended in 2007. Cal. R. Ct. 4.420 (West 2009).

18; Lodgment No. 7, Rep.'s Tr., vol. 5, 597.) Thepsombandith argues that one of his prior firearm possessions was a juvenile adjudication, which is not a "prior conviction." (Traverse 19 (citing United States v. Tighe, 266 F.3d 1187, 1195 (9th Cir. 2001); Lodgment No. 2, Clerk's Tr., vol. 2, 212.)

Respondent contends the trial court properly relied on Thepsombandith's prior convictions when imposing the upper term. (Answer Attach. #1 Mem. P. & A. 14.) Respondent cites Butler, stating that this finding did not require the trial court to make any "qualitative evaluations of the nature or seriousness of past crimes." (Id. (citing Butler, 528 F.2d at 644-46).)

Thepsombandith had two prison priors at the time of sentencing: (1) taking a vehicle while in possession of a gun and (2) being in possession of a firearm while on parole. (Lodgment No. 1, Clerk's Tr., vol. 1, 7; Lodgment No. 2, Clerk's Tr., vol. 2, 213; Cal. Penal Code §§ 10851(a), 12022(a)(1), 12021(a)(1).) Separately, he had numerous juvenile adjudications for burglary, possession of a concealed firearm, and two instances of possession of burglary tools. (Lodgment No. 2, Clerk's Tr., vol. 2, 212; Cal. Penal Code §§ 459, 12025(b), 466 (West Supp. 2009).)

The United States Supreme Court has recognized two exceptions to a defendant's Sixth Amendment right to a jury trial. First, a fact admitted by the defendant may be used to increase his or her sentence beyond the maximum. Blakely, 542 U.S. at 303. Second, the right to a jury trial and the proof beyond a reasonable doubt requirement do not apply to the fact of a prior conviction. Id.; see Apprendi, 530 U.S. at 490.

At the time of Thepsombandith's sentence, he had two prior felony convictions. (Lodgment No. 1, Clerk's Tr., vol. 1, 7; Lodgment No. 2, Clerk's Tr., vol. 2, 213.) "[I]f at least one of the aggravating factors on which the judge relied in sentencing [defendant] was established in a manner consistent with the Sixth Amendment, [Defendant's] sentence does not violate the Constitution." Butler, 528 F.3d at 643. Accordingly, the fact of Thepsombandith's prior convictions was sufficient by itself to subject him to the upper term.

The prior conviction exception does not extend to qualitative evaluations about the nature or seriousness of past crimes because such determinations cannot be made solely by looking to the documents of conviction. Butler, 528 F.3d at 644 (citing United States v. Kortgaard, 425 F.3d 602, 607 (9th Cir. 2005) (holding that the seriousness of past offenses and the likelihood of recidivism are facts that fall outside of the prior conviction exception); Stokes v. Schriro, 465 F.3d 397, 404 (9th Cir. 2006) (deciding whether the present crime is strikingly similar to a past crime also falls outside of the prior conviction exception)). Nor does the exception apply to past convictions as a juvenile because juvenile proceedings lack the Sixth Amendment protections that adult trials provide. Butler, 528 F.3d at 644-45 (citing United States v. Tighe, 266 F.3d at 1193-95) (explaining that "the 'prior conviction' exception to Apprendi's general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt[]") (citing Apprendi, 530 U.S. at 496).

The aggravating circumstance justifying Thepsombandith's sentence was his prior convictions; specifically, he had been in possession of a gun on three prior occasions in the course of his prior convictions. "This is his fourth time of having a gun in his possession. There were three other times." (Lodgment No. 7, Rep.'s Tr., vol. 5, 597.) The aggravating factor could be determined solely by looking to the documents of conviction. Butler, 528 F.3d at 646. The determination was not based solely on qualitative evaluations, the seriousness of his past crimes, or the likelihood of recidivism. See Kortgaard, 425 F.3d at 607-08. Nor was the determination based solely on Thepsombandith's juvenile adjudication. See Butler, 528 F.3d at 644 (citing Tighe, 266 F.3d at 1193-95). Even if the sentencing judge considered the juvenile adjudication when sentencing Thepsombandith, the judge was permitted to rely on the prior gun possessions established by the two remaining convictions. (Lodgment No. 1, Clerk's Tr., vol. 1, 7; Lodgment No. 2, Clerk's Tr., vol. 2, 213.) Importantly, only one aggravating factor is necessary, and there were two adult priors. Butler, 528 F.3d at 642-43; (Lodgment No. 1, Clerk's Tr., vol. 1, 7; Lodgment No. 2, Clerk's Tr., vol. 2, 213.)

The Court must examine the whole record, including the evidence presented at sentencing. Butler, 528 F.3d at 651. Unlike Butler, the probation officer's report referred to at the time of sentencing has been lodged; this Court is able to review what evidence was submitted to the trial court. (Lodgment No. 1, Clerk's Tr., vol. 1, 7; Lodgment No. 2, Clerk's Tr., vol. 2, 208-21; see Butler, 528 F.3d at 651 ("[W]e have not found a probation report or any other document that reflects [Defendant's]

probationary status at the time of the crime."); see also Williams v. Scribner, No. CV 07-2694-R (AGR), 2008 U.S. Dist. LEXIS 51032, at *2 (9th Cir. June 30, 2008). The sentencing judge had sufficient evidence from which she could find the aggravating factor to justify imposition of the upper term. Consequently, the state supreme court's decision was not contrary to, or an unreasonable application of, clearly established Supreme Court law. 28 U.S.C. § 2254(d)(1). Moreover, the state court decision was based on a reasonable determination of the evidence. See 28 U.S.C. § 2254 (d)(2).

3. Harmless Error

Even if there was a constitutional error, any error was harmless. At least one aggravating factor supports Petitioner's upper term sentence. Assuming federal law was clearly established and the state court erred in its analysis of Thepsombandith's sentencing claim, the Court must apply a harmless error analysis. Washington v. Recuenco, 548 U.S. 212, 221 (2006); United States v. Zepeda-Martinez, 470 F.3d 909, 910 (9th Cir. 2006); United States v. Banuelos, 322 F.3d 700, 705 (9th Cir. 2003). Petitioner is only entitled to habeas relief "if the sentencing error in his case is not harmless." Butler, 528 F.3d at 648 (citing Recuenco, 548 U.S. at 220).

An error is harmless if it does not have a "substantial and injurious effect on [Defendant's] sentence." Butler, 528 F.3d at 648) (citing Hoffman v. Arave, 236 F.3d 523, 540 (9th Cir. 2001)); see also Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). Furthermore, an error is "harmless if it is not prejudicial as to just one of the aggravating factors at issue." Butler, 528 F.3d

at 648. A court must grant relief if it is in grave doubt as to whether a jury would have found the aggravating factors beyond a reasonable doubt. Id. (citing O'Neal v. McAninch, 513 U.S. 432, 436 (1995)).

The record illustrates Thepsombandith was convicted of taking a vehicle while in possession of a gun on December 9, 1994, and sentenced to three years in prison, creating his first prison prior. (Lodgment No. 1, Clerk's Tr., vol. 1, 7; Lodgment No. 2, Clerk's Tr., vol. 2, 213.) On December 4, 1998, he was convicted of being in possession of a firearm while on parole and sentenced to two years in prison, creating his second prison prior. (Id.) The trial judge was presented with evidence of both prior convictions. In fact, the trial judge referenced the prior convictions when she imposed the upper term. "This is his fourth time of having a gun in his possession. There were three other times." (Id. at 597.) Furthermore, Thepsombandith admitted to having the prior convictions. (Lodgment No. 2, Clerk's Tr. Vol. 2, 307, 314.) Therefore, any error in using the fact of Petitioner's prior convictions to impose the upper term was harmless because there is no "grave doubt" that the jury would have found the aggravating factors beyond a reasonable doubt. See O'Neal, 513 U.S. at 436.

Habeas relief is not warranted on claim three. The state court decision was not contrary to, and did not involve an unreasonable application of, clearly established law as determined by the United States Supreme Court. Nor was it based on an unreasonable determination of the facts in light of the evidence.

For this reason, the Court should deny habeas relief based on this ground in Thepsombandith's Petition.

D. Evidentiary Hearing

In his Traverse, Thepsombandith requests an evidentiary hearing or declaration from his trial counsel regarding his ineffective assistance of counsel claim. (Traverse 23.) Specifically, Petitioner seeks testimony from defense counsel regarding the failure to object to the prosecutorial misconduct at trial. (Id.)

Respondent contends the California courts have already made reasonable factual determinations under 28 U.S.C. § 2254(d), and Thepsombandith's claims do not rely on evidence that is not in the state court record. (Answer Attach. #1 Mem. P. & A. 16.) Warden Almager argues that Thepsombandith failed to "present the need to further develop evidence in additional proceedings." (Id.)

Under 28 U.S.C. § 2254(e)(2), as amended by AEDPA, a district court presented with a request for an evidentiary hearing must first determine whether the petitioner failed to develop the factual basis of his claims in state court. Insyxiengmay v. Morgan, 403 F.3d 657, 670 (9th Cir. 2005) (citing 28 U.S.C. § 2254(e)(2)(A-B)); Williams v. Taylor, 529 U.S. at 430. "[A] failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Williams, 529 U.S. at 432.

If a petitioner developed the record in state court, the federal habeas court examines whether an evidentiary hearing is

appropriate or required under Townsend v. Sain, 372 U.S. 293 (1963). There are six Townsend factors to consider:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Insyxiengmay, 403 F.3d at 670 (quoting Townsend, 372 U.S. at 313).

"'An evidentiary haring on a habeas corpus petition is required whenever petitioner's allegations, if proved, would entitle him to relief.'" Id. at 670 (quoting Turner v. Marshall, 63 F.3d 807, 815 (9th Cir. 1995)). If a petitioner failed to develop the factual basis of a claim in the state courts, this Court does not have discretion to conduct an evidentiary hearing unless Petitioner shows that the following requirements of 28 U.S.C. § 2254(e)(2) are met:

> (A) the claim relies on --
>
> > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2)(A)-(B) (West 2008). After satisfying § 2254(e)(2)(A)-(B), Petitioner must then "meet one of the Townsend

factors and make colorable allegations that, if proved at an evidentiary hearing, would entitle him to habeas relief." Insyxiengmay, 403 F.3d at 670.

The Supreme Court has been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the states' interest in the integrity of their criminal proceedings. Williams, 529 U.S. at 436 (citing Coleman v. Thompson, 501 U.S. 722, 726, (1991); McCleskey v. Zant, 499 U.S. 467, 493 (1991). "Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." Williams, 529 U.S. at 437.

Thepsombandith appears to claim that he failed to develop the state court record and maintains that to demonstrate ineffective assistance of counsel, he must prove his counsel's omissions were the result of negligence, oversight, or unreasonable strategy. (Traverse 23.)

Indeed, an evidentiary hearing is appropriate if, among other things, the state court hearing did not adequately develop the facts or the fact-finding procedure was inadequate. Townsend, 372 U.S. at 313. But Thepsombandith's ineffective assistance claim was fully developed in the state court record and considered by the court of appeal. (See Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 9-11.) A transcript of the prosecutor's closing argument was included in the appellate record. (See Lodgment No. 7, Rep.'s Tr., vol. 5.) The court of appeal quotes from the transcript. (Lodgment No. 7, Rep.'s Tr.,

vol. 5, 522-23, 536-37; Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op. at 5-6.)

Because the factual basis of Thepsombandith's ineffective assistance of counsel claim was developed in state court, he must satisfy one of the six Townsend factors to be entitled to an evidentiary hearing. Insyxiengmay, 403 F.3d at 670. None of the factors requires a hearing in his case.

The merits of Petitioner's ineffective counsel claim were resolved at the state appellate level. As discussed above, the appellate court's factual determination regarding the alleged negligence or oversight of trial counsel when he failed to object is supported by the record. Additionally, the fact-finding procedure employed was adequate to give Thepsombandith a full and fair hearing. Thepsombandith has made no allegation of newly discovered evidence. The material facts were adequately developed at the state court hearing, and there is no indication that the state trier of fact did not provide a full and fair fact hearing.

Even if Thepsombandith could meet one of the Townsend factors for his ineffective assistance of counsel claim, a hearing is only required where "petitioner's allegations, if proved, would entitle him to relief.'" Id. (quoting Turner v. Marshall, 63 F.3d 807, 815 (9th Cir. 1995)). Assuming the facts are as Thepsombandith alleges and his trial counsel's omissions were the result of negligence, oversight, or unreasonable strategy, Thepsombandith is not entitled to habeas relief. (See Traverse 23.) At most, Petitioner's ineffective assistance claim would save his prosecutorial misconduct claim from being procedurally defaulted. But the prosecutorial misconduct claim fails on its merits.

Furthermore, the federal habeas court need not determine the actual reason for counsel's failure to object as long as the failure falls within the range of reasonable representation. Morris v. California, 966 F.2d 448, 456-57 (9th Cir. 1991), cert. denied, 506 U.S. 831 (1992) (citation omitted). Petitioner does not satisfy any of the Townsend factors; consequently, his request for an evidentiary hearing is **DENIED**.

V. CONCLUSION

For the reasons set forth above, Petitioner's request for an evidentiary hearing is **DENIED**. In addition, the Court recommends that the Petition for Writ of Habeas Corpus be **DENIED**.

This Report and Recommendation will be submitted to the United States District Court judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any party may file written objections with the Court and serve a copy on all parties on or before June 26, 2009. The document should be captioned "Objections to Report and Recommendation." Any reply to the objections shall be served and filed on or before July 10, 2009. The parties are advised that failure to file objections within the specified time may waive the right to appeal the district court's order. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991).

Dated: May 18, 2009

RUBEN B. BROOKS
United States Magistrate Judge

cc: Judge Benitez
All parties of record